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Paper No. 11
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re White Toque, Inc.

Serial No. 75/644,652

Myron Amer of Myron Amer P.C. for White Toque, Inc.

Barbara Sundberg Loughran, Trademark Examining Attorney, Law
Office 101 (Jerry Price, Managing Attorney).

Before Seeherman, Bucher and Bottorff, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

White Toque, Inc. has applied on the Supplemental
Register to register the words HARICOTS VERTS as a trademark
for goods identified, after amendment, as "string beans."
Initially, applicant had filed an application on the Principal
Register for the alleged mark HARICOT VERT¹ for goods first
identified as "green beans."² In the initial Office action of

¹ Application Serial No. 75/644,652 was filed on February 22, 1999, based upon applicant's claim of use in commerce since at least as early as January 1992. In an Office action dated June 13, 2000, the Trademark Examining Attorney noted that the original drawing page showed the alleged mark as HARICOT VERT whereas the specimens showed use of the designation HARICOTS VERTS. In its response of July 5, 2000, applicant requested that the mark be amended to HARICOTS VERTS, and the Trademark Examining Attorney approved this amendment.

² The Trademark Examining Attorney's approval of applicant's amendment of the goods from "green beans" to "string beans" is consistent with Trademark Rule 2.71(a). The entire record shows that "string beans" are a subset of "green beans," and hence the

July 6, 1999, the Trademark Examining Attorney refused this matter as merely descriptive. Applicant then amended the application to the Supplemental Register with its response of August 17, 1999. Accordingly, the Trademark Examining Attorney later made final her refusal to register the term HARICOTS VERTS on the Supplemental Register. She held that it is a generic term for the goods, and hence, incapable of indicating source. Applicant then filed the instant appeal.

Applicant and the Examining Attorney have fully briefed the case, but applicant did not request an oral hearing.

The sole issue before us is whether the term HARICOTS VERTS is capable of identifying and distinguishing the source of applicant's string beans. We find that it is incapable of such a function and, hence, affirm the refusal to register on the Supplemental Register.

In support of her position that the term is generic for applicant's beans, the Trademark Examining Attorney has made of record entries from a number of dictionaries and foreign language translation services, such as the following:

haricot: The edible pod or seed of any of several beans ...

[The American Heritage Dictionary of the English Language, electronic version (3rd Ed. 1992)]

vert: (1) Heraldry: the color green; (2) Green vegetation ...

amended identification falls within the scope of the original identification of goods.

[The American Heritage Dictionary of the English Language, electronic version (3rd Ed. 1992)]

haricot: bean ... **haricot vert:** French bean
[Webster's New World French Dictionary (1995)]

green bean (English): translates into haricot
vert (French)

[Logos Group, online query at
www.logos.it/dictionary/owa/dictionary.query

French beans, haricots verts, green beans
(English): translate into haricots verts (French)

[Logos Group, online query at
www.logos.it/dictionary/owa/dictionary.query

French bean (English): translates into haricot
vert (French)

[Systran Translation software, online query at
<http://babelfish.altavista.digital.com/cgi-bin/translate?>

French beans (English): translates into haricots
verts (French)

[Systran Translation software, online query at
<http://babelfish.altavista.digital.com/cgi-bin/translate?>

Furthermore, we also take judicial notice of an entry from Cassell's French-English Dictionary which shows "haricots verts" as the translation for "French beans."³

The Trademark Examining Attorney included copies of the first twenty excerpts extracted from more than 1700 stories in the LEXIS/NEXIS data base containing some form (e.g., singular and/or plural) of the searched term "haricot vert," from which we have set out the first half-dozen excerpts as follows:

La Tour's menu is basic. You can start the meal with gazpacho; an endive salad with **haricots verts**,

³ Cassell's French-English English-French Dictionary, New Edition, p. 390).

Roquefort cheese and walnuts; or poached skate on a bed of frisee with lime-orange dressing ...
["Diner's Journal," The New York Times, June 9, 2000, p. E-37]

Peaches, **haricot verts**, ichibon eggplant, orka (sic), merit yellow corn, Creole tomatoes, blueberries, cantaloupe, squash, cucumbers, yard eggs, ...
["Garden Advice," The Times Picayune, June 9, 2000]

All the main dishes came garnished with a sprig of fresh rosemary and sided with a dull mélange of undercooked, underseasoned carrot slices, **haricots verts**, and baby asparagus spears.
["Sweet and Sour Citrus," Cleveland Scene, June 8, 2000]

Next we tried the lolla rosa salad (\$6.⁹⁵) with **haricot verts**, paper thin slices of onions and fennel and crumbles of blue cheese ...
["Café Monk Shows Potential but Remains Inconsistent," The San Francisco Chronicle, June 7, 2000, p. 7ZZ1]

... gleaming white anchovies and shaved Parmesan laid over *al dente* asparagus, and a vibrant carpaccio topped with a **haricot vert**/yellow wax bean salad.
["Bruno's Red Leather Booths are Filled Again," The San Francisco Chronicle, June 7, 2000, p. 2ZZ1]

... range chicken set new standards for a crisp-skinned, moist and tender bird. It was surrounded by **haricots verts**, roasted cipolini onions, a portion of succini (sic) stuffed with vegetables and excellent mashed potatoes in lemon-thyme sauce.
["A Serious Chef and Staff Make a Difference," The New York Times, June 4, 2000, §14CN, p. 17]

In spite of the plethora of evidence placed into the file by the Trademark Examining Attorney, applicant argues that she has failed to demonstrate that its alleged mark is generic for string beans. Accordingly, applicant argues as follows:

[A food glossary entry] states that "haricots verts" is a French word for "green beans." It says that "green beans" are also known as "string beans," but it does not actually say that "haricots verts" is a French word for "string beans." It also does not say that there is a particular type of green bean that is a French string bean known as "haricots verts." More significant, this single statement from all the Exhibits made of record does not support that what is asserted in the PTO brief ... is a fact well known to the public.

[applicant's reply brief, p. 2]

Finally, applicant argues that the determination of whether a designation is capable of registration is a most liberal standard applied in favor of registrability, and points to the alleged "incongruity" in the spelling of this French language term as being sufficiently ingenious to permit registration on the Supplemental Register.

In order to be registrable on the Supplemental Register, the matter sought to be registered must be "capable of distinguishing applicant's goods or services." Section 23 of the Trademark Act, 15 U.S.C. §1091.⁴ Generic terms are by

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"... All marks capable of distinguishing applicant's goods or services and not registrable on the principal register herein provided, except those declared to be unregistrable under subsections (a), (b), (c), (d), and (e)(3) of section 2 of this Act, which are in lawful use in commerce by the owner thereof, on or in connection with any goods or services may be registered on the supplemental register upon the payment of the prescribed fee and compliance with the provisions of subsections (a) and (e) of section 1 so far as they are applicable...

definition incapable of indicating source and thus are unregistrable on the Supplemental Register. As our principal reviewing court has stated:

...[D]etermining whether a mark is generic ... involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?

H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986). The Office has the burden of proving genericness with "clear evidence." In re Merrill, Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). The critical issue in genericness cases such as this one is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus or category of goods in question. In re Recorded Books, Inc., 42 USPQ2d 1275 (TTAB 1997). Evidence of the relevant public's perception of a term may be obtained from any competent source, including newspapers, magazines, dictionaries, trade journals, catalogs and other publications. In re Leatherman Tool Group, Inc., 32 USPQ2d 1443, 1449 (TTAB 1994), citing In re Northland Aluminum Products, Inc., 777 F.2d 1566, 227 USPQ 961, 963 (Fed. Cir. 1985). And of course, in this, as in all cases, the Office must be able to satisfy both elements of the test as set forth in the controlling

precedent of Marvin Ginn. See In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999).

Applicant's current identification of goods is "string beans." Its packaging identifies the goods as "string beans." The record is clear that, in the language of Marvin Ginn, the legal genus of applicant's goods herein is "string beans."

The Trademark Examining Attorney has made the case that the term "haricots verts" will be understood by the relevant public primarily to refer to tiny string beans, whether one considers it to be a foreign term, and therefore to be treated under the doctrine of foreign equivalents, or whether one considers the term as having entered the vernacular as shown by its wide-spread use in the English language press, where it often appears with other culinary terms without translation or further clarification.

The record shows that *haricot vert* is French for "green bean" or "French bean."⁵ Yet, applicant argues that botanically "string bean" does not overlap with the bean known as "le haricot vert." Furthermore, applicant also argues that when pluralized in French, the proper term would be "haricots vert," not "haricots verts":

The English translation of the French word VERT (in the singular) is GREEN (also in the singular) and grammatically would not be modified to the French word VERTS (in the plural) as making no

⁵ See entries listed on page 3, *supra*.

sense as an adjective for the French word HARICOTS
(in the plural).

(applicant's Brief on Appeal, p. 2.)

Applicant has provided no authority for this statement. In fact, this argument would seem to be contradicted by the general principle that a plural adjective would be used with a plural noun. Although there are some references in the record to "haricotss vert" and "haricot verts," the majority of the references are to "haricotss verts." More importantly, the Cassell's French-English dictionary presents the term as "haricots verts" - exactly the same as the spelling used by applicant in its amended drawing.

Furthermore, even without relying upon the doctrine of foreign equivalents, the record shows that this term has entered the lexicon of the American culinary world to identify tiny string beans. The term "haricots verts" appears on restaurant menus, in glossaries of English language terms, and in newspaper articles to refer to a tiny green string bean.

Decision: Hence, we find that the Trademark Examining Attorney has satisfied both elements of the test as set forth in Marvin Ginn and we affirm the refusal to register under Section 23 of the Act.